

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE GUARDIAN NEWS, INC. and SELIM  
ZHERKA,

Plaintiffs,

07 Civ. 07078 (CLB)

-against-

PHILIP AMICONE, individually,  
EDMUND HARTNETT, individually,  
JOHN A. LISZEWSKI, individually  
CITY OF YONKERS, New York,  
PAUL WOOD, individually, POLICE  
OFFICERS JOHN DOE'S #1 to #20,  
individually, and SANITATION WORKERS  
#1 to #20,

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION**

**Preliminary Statement**

Plaintiffs submit this memorandum of law in support of their motion for a preliminary injunction prohibiting Defendants from : i) confiscating any newsracks placed by The Guardian News, Inc. in the City of Yonkers for distribution of The Westchester Guardian; confiscating any copies of The Westchester Guardian intended to

be distributed on City-owned premises within the City of Yonkers; threatening employees of The Guardian News, Inc. with arrest/incarceration for distributing The Westchester Guardian (hereinafter the "Guardian") within the City of Yonkers; and *inter alia* directing the Defendants to forthwith return to Plaintiffs all of the newsracks and all of the copies of the Guardian that they have unlawfully seized.

### **The Material Facts**

On the front page of the Guardian published July 5, 2007, the headline was: "Amicone Sells Out Families of Yonkers. . .Enbraces Giulio Cavallo; Brings in Nick Spano Mob" (Zherka Affidavit, para. 2). In that connection a second page article referenced Amicone as a "Man Who Would: Take the endorsement of Nick Spano, a fallen, crooked politician, and create taxpayer-funded jobs for his mob; Bring Giulio Cavallo, a political prostitute who sells cross-endorsements for cash, into the election process; Run on a party line whose chairman, Zehy Jereis, is an election fraudster and a convicted drug dealer". *Id.*

Also in that edition of the Guardian the following "Opinion" appeared: "Such has been the sordid tale of recent elections in Westchester, and particularly in the City of Yonkers. Given that history, we believe that the race for Mayor of Yonkers, pitting incumbent Republican Phil Amicone, and every undesirable political creature he can muster, against Independent Nader Sayegh, and Democrat Dennis Robertson, in a context that will require the utmost attention of the Voters' Rights Division of the Justice Department, and the provision of sufficient observers and enforcement personnel to protect the integrity of the outcome". *Id.*

On the front page of the Guardian published the week of July 9, 2007, the headline read:

"A Tale of Two Cities", beneath which to the left was a photograph of the Mayor of Mount Vernon, New York (Ernie Davis), and beneath which to the right was a photograph of Amicone. The Davis photograph bore the legend: "DUMB". The Amicone photograph bore the legend: "DUMBER" (hereinafter collectively referred to as "DUMB & DUMBER") - - in connection with which readers were invited to "See In Our Opinion. *Id* at para. 3.

In the editorial concerning the front page headlines, captioned "In Our Opinion . . . Sodom and Gomorrah", the Guardian expressed *inter alia* the following thoughts regarding Davis and Amicone:

"We must sadly conclude that Davis and Amicone have each been abject failures, little more than caretakers, at best, not likely to improve the circumstances of the city they have been entrusted with, if placed back into their present positions. In short, we believe Ernie Davis and Phil Amicone have not only squandered vast human and financial resources, but also the wonderful opportunity to bring about significant positive change.

Consider the fact that Mount Vernon and Yonkers are each under Federal Investigation. . .in connection with projects and programs involving huge sums of money. . .There's a distinct odor of fish somehow attached to these financial mysteries.

. . .As regards crime, there is no denying that street crime and

gun violence in both Yonkers and Mount Vernon have been spiraling out of control under Amicone and Davis respectively. Additionally, the Yonkers Police Department has had, and continues to have, a well-deserved reputation for police brutality, a problem neither Phil Amicone nor Commissioner Hartnett have made any convincing effort to abate.

\* \* \*

The decay and destruction of formerly strong, proud neighborhoods and public schools under Davis and Amicone has been the inevitable product of corrupt, uninspired administrations more concerned with satisfying and fattenening political powerbrokers and criminal elements such as Giulio Cavallo, Zehy Jereis, Nicky Spano, Larry Schwartz, Reggie LaFayette, and their ilk. . .In short, we believe Ernie and Phil have been marching to the beat of the wrong drummer for quite some time, and are not likely to alter their cadence anytime soon.”

*Id.* at para. 4.

Commencing during the week of July 9, 2207, and continuing thereafter, a number of Guardian employees and the owner of the newspaper repeatedly sought to non-disruptively distribute inside and/or outside Yonkers’ City Hall:

- a. Copies of DUMB & DUMBER as contained in the Guardian
- b. Copies of the July 26, 2007, Guardian the front page headline of which

reported: "Guardian Publisher Offers \$25,000 Reward For Information Leading to the Arrest and Conviction of Westchester Public Officials and Politicians Who Have Broken the Law and Betrayed the Public Trust", and,

c. Copies of the August 2, 2007, Guardian the front page headline of which read: "Phil Amicone A Huge Flop! Fails to Deal With Police Brutality. Sharpton Correctly Identifies Problem As Not Targeting Only the Minority Community". *Id.* at 5.

In that connection pursuant to a self-evidently coordinated action orchestrated by Amicone, Hartnett, Liszewsky, their co-defendants and numerous members of the City's Police and Public Works Departments, all of those copies of the Guardian were repeatedly confiscated and discarded by Defendants - - conduct manifestly motivated in whole or in substantial respect by the substantive content of the Guardian concerning Amicone and the Yonkers Police. *Id.* at 6.

Also in that connection and pursuant to the same self-evidently coordinated action, Guardian newsracks were repeatedly confiscated and discarded by Defendants under the direction of Liszewski, action taken by similarly motivated hateful conduct - - as observed by your affiant and evidenced by photographs taken of the City employees annexed hereto. *Id.* at 7.<sup>1</sup>

As a further consequence of that self-evidently coordinated action, Defendants repeatedly and daily targeted employees of The Guardian News, Inc., threatened them with arrest, and charged them criminally - - with the same apparent motivation and the objective of entirely stopping dissemination of the Guardian in and about City Hall and the City because of its substantive content. *Id.* at 8.

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<sup>1</sup> By letter dated August 21, 2007, counsel for the Defendants admitted: "the City of Yonkers is in possession of approximately 33 'newsracks' which we believe belong to your client".

By way of contrast publications favorable to Amicone and the City (such as “Yonkers City of Vision”) were permitted by the Defendants to be dispensed from *inter alia*: a. a newsrack, located on a stairway in City Hall, and a counter at a security desk in City Hall as manned by a uniformed Police Officer. *Id.* at 9.

Also by way of contrast, persons distributing the publications favorable to Amicone and the City were permitted with impunity by Defendants to place those periodicals: in the stairway newsrack referenced *supra*, and on the security desk counter as referenced *supra*. *Id.* at 10.

As a proximate result of Defendants’ conduct employees of The Westchester Guardian, Inc. were confronted by City Police Officers, including Defendant Paul Wood and: ordered to cease distributing the Guardian on the supposed premise that its distribution was illegal in Yonkers; issued criminal informations charging them with distributing the Guardian; ordered to leave the premises; threatened with arrest/incarceration should they return to distribute the Guardian; and coerced to depart from the City by intimidation. *Id.* at 11.

## **POINT**

### **A PRELIMINARY INJUNCTION SHOULD BE GRANTED**

Well-settled law in this jurisdiction dictates that in “most cases, a party seeking a preliminary injunction must demonstrate (1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case that make them fair ground

for litigation, and a balance of hardships tipping decidedly in its favor”. Forest City Daily Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999).

Prohibitory preliminary injunctions, such as that sought in the case at bar, “are permitted ‘only when the moving party has demonstrated that (1) absent injunctive relief, he will suffer “irreparable injury”, and (2) there is a “likelihood that he will succeed on the merits of his claim.” Field Day, LLC v. County of Suffolk, 463 F.3d 167, 181 (2d Cir. 2006).

As to the first element, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”. Elrod v. Burns, 427 U.S. 347, 373 (1976); Lusk v. Village of Cold Spring, 475 F.3d 480, 492 (2d Cir. 2007). And since the suppression of a newspaper because of its substantive content and/or editorial opinions is manifestly illegal [Lusk, *supra* at 485, (“The Supreme Court has referred to ‘[p]rior restraints on speech and publication [as] the most serious and least tolerable infringement on First Amendment rights”)]there is an extremely high likelihood that Plaintiffs will success on the merits of their claims.

In short, following a hearing the requested injunctive relief should be granted.

### **Conclusion**

A preliminary injunction should be granted barring the Defendants’ from: i) confiscating any newsracks placed by The Guardian News, Inc. in the City of Yonkers for distribution of the Guardian; confiscating any copies of the Guardian intended to be distributed on City-owned premises within the City of Yonkers; threatening employees of The Guardian News, Inc. with arrest/incarceration for distributing the Guardian within

the City of Yonkers; and *inter alia* directing the Defendants to forthwith return to Plaintiffs all of the confiscated newsracks and newspapers.

Dated: White Plains, New York  
September 4, 2007

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